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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Jeanette E. Gondeck prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 9, 1962.

OPINIONS OF THE COURTS BELOW.

By Findings of Fact and Compensation Order dated December 31, 1959, William M. O'Keeffe, Deputy Com-

missioner of the United States Department of Labor, Bureau of Employees' Compensation, Sixth Compensation District, in the matter of the claim for compensation under The Defense Bases Compensation Act, made an award of compensation to the Petitioner as Claimant and widow of Frank J. Gondeck, deceased, and his minor daughter Barbara Ann Gondeck. The Order is set forth at pages A14-A18, of the appendix of this petition; the decision is not reported.

On the review of the award to the United States District Court for the Southern District of Florida, Honorable Emett C. Choate, District Judge, by Findings of Fact and Conclusions of Law entered September 15, 1960 (App. A10), and Final Judgment entered November 7, 1960 (App. A14), set aside the award and enjoined enforcement thereof, by granting the motion for summary judgment filed by the employer-carrier, the Plaintiffs therein and Respondents herein. The decision is not reported.

In the appeal to the United States Court of Appeals for the Fifth Circuit, the Court affirmed the Final Judgment of the District Court and Dismissed the appeal of the United States, by judgment entered February 9, 1962 (App. A10). The opinion of the Court of Appeals has not yet been reported and is set forth in the appendix of this petition at pages A3-A9.

A petition for rehearing was denied by Order of March 7, 1962.

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on February 9, 1962, and the timely petition for rehearing was denied March 7, 1962.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U.S.C., Sections 1254 (1) and 2101 (c) as well as in Rule 19 (b) of the rules of this Court under this Court's power of supervision over the Federal Judicial system, and more particularly on the grounds that the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Court and of other Courts of Appeals, and has so far departed from the accepted and usual course of judicial proceeding and has sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

STATUTES INVOLVED

The statutory provisions involved are the Defense Bases Compensation Act, of August 16, 1941, 55 Stat. 622, 42 U.S.C. 1651 (a)(1); the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, July 26, 1956, 70 Stat. 654, 33 U.S.C. 903 (b), 920 (a), 920 (c), 920 (d), 921 (b); and the Administrative Procedure Act of June 11, 1956, 60 Stat. 237, 5 U.S.C. 1009, the pertinent portions of which are set forth in the Appendix herein.

QUESTIONS PRESENTED

1. Should the remedial humanitarian intent of a workmen's compensation act be subverted by outmoded common law principles of an equitable nature in a case where a widow and her child have been awarded compensation for the death of a worker at a defense base where the Deputy Commissioner found that the death occurred in the course of, and growing out of his employment while returning to base from reasonable recreation of type known

to and made readily available to the employees by the employer where it appears that the decedent was a passenger in a company vehicle forbidden for such use, but that decedent was never so informed?

2. Is a defense base worker within a zone of special danger and entitled to compensation for injuries and death suffered while returning to base after seeking reasonable recreation and entertainment of a type known to the employer and made more readily available to the employees, although such recreation and entertainment was not furnished or supervised by the employer?

3. Does the Administrative Procedure Act grant the Federal Courts the power to reweigh the evidence and inferences drawn therefrom in the review of an award of compensation for death based on stipulated facts in a Defense Bases Compensation case?

STATEMENT OF THE CASE

The case was submitted to the Deputy Commissioner on stipulated facts. They are adequately summarized by the Court of Appeals, and the Court's statement from its opinion is accepted as the statement of the case (R. 105-107), and in this appendix, pp. A4-A6.

However, briefly stated in the interest of continuity, Frank Gondeck was employed as a civilian worker at the United States Air Force Base, San Salvador Island, B.W.I.

He was on duty eight hours and off 24, subject to emergency call at all times. On April 24, 1958, he went to nearby Cockburn Town in a jeep driven by James F. Norman; Fox Fry and R. M. Smith were also passengers. They had one beer, and on the return, almost at the gate,

the jeep overturned. Gondeck was injured, and died on April 27, 1958.

Smith and Norman had been warned not to use the jeep for personal missions; Gondeck had not been so informed.

The Deputy Commissioner entered an award of compensation and funeral expenses to the widow and surviving child. On review the District Judge set aside the award and enjoined enforcement. The Court of Appeals for the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

Reversal of the decisions of the Court of Appeals and the District Court and reinstatement of the award of compensation by the Deputy Commissioner is sought because the beneficial provisions of the compensation laws were disregarded and the intent of Congress misapprehended when it was held that Frank J. Gondeck's death was not a consequence of his employment.

The Court of Appeals for the Fifth Circuit is in conflict with the opinions of this Court and other Courts of Appeals in holding defense base workers may not be compensated for injuries or death suffered on return trips to their bases from reasonable recreation trips to town if the recreation is not furnished and supervised by the employer; in transportation not provided by the employer for the specific purpose, and that the employer must receive some tangible benefit as contrasted to improvement of worker morale, which the Court denotes an intangible immaterial benefit.

The Court of Appeals for the Fifth Circuit departed from the opinions of this Court and other Courts of Appeals

by setting aside an award of compensation for death suffered by a defense base worker while returning to base in a company vehicle.

The Court of Appeals for the Fifth Circuit has penalized the widow and minor child of a deceased defense base worker for the violation of a company rule by another worker without the decedent's fault, where the violation resulted in decedent's death.

The Court of Appeals for the Fifth Circuit has misapprehended the scope of judicial review permitted in the Administrative Procedure Act and has expanded the judicial authority.

POINT I

The Deputy Commissioner Properly Awarded Compensation for Death of a Defense Base Worker Who Was Killed While Returning to Base from a Trip to Town While Seeking Reasonable Recreation.

Reasonable recreation is an incident of civilian employment at a United States military base in a foreign land. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). This principle is so deeply ingrained into the Defense Bases Act that it cannot be reasonably controverted.

In other jurisdictions, the same principle has been consistently followed, and compensation awarded:

Hastorf-Nettles v. *Pillsbury*, 203 F.2d 641 (9th Cir. 1953) (returning to defense base from county fair).

C. V. Lytle Co. v. *Whipple*, 156 F.2d 154 (9th Cir. 1944).

Liberty Mutual Ins. Co. v. *Gray*, (McClees' case) 137 F.2d 926 (9th Cir. 1943) (returning to defense base after overstaying leave).

Turner v. *Willard,* 154 F. Supp. 352 (S.D.N.Y. 1956) (returning to defense base from bowling league conference).

Travelers Ins. Co. v. *O'Hearne,* (Wilson's case) No. 1436, E.D. Va. (1953) (unreported) (returning to defense base in jeep).

Travelers Ins. Co. v. *O'Hearne,* (O'Mara's case) No. 1429, E. D. Va. (1954) (unreported) (killed in Algiers chasing thief who grabbed his wallet at a movie line).

The State acts seem to follow this rule:

Lamm v. *Silver Falls Timber Co.,* 286 Pac. 527 (Ore. 1930) (returning to lumber camp from home).

Gabumas v. *Pan American World Airways,* 188 N. Y. S. 2d 372 (1951) (stewardess in bicycle mishap during layover in Paris).

Lewis v. *Knappen-Tibbetis-Abbott Eng. Co.,* 108 N.E.2d 609 (N.Y. 1952) (shot by sniper while sightseeing in Jerusalem).

In analogous situations, such as actions for seamen's maintenance and cure, injuries suffered during shore leave have been held by this Court to be within the scope of employment.

Warren v. *United States,* 340 U.S. 523 (1951).

Farrell v. *United States,* 336 U.S. 511 (1949).

The Fifth Circuit's proposition that benefit to the employer must be shown to provide coverage for recreational injuries is in direct conflict with this Court.

The Fifth Circuit said herein:

> "No benefit to the employer has been shown to result from the going by GONDECK to a native club for a beer unless it be the intangible and, we think, immaterial benefit of improvement of morale that might be the consequence of such excursion."

On the other hand, this Court said in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*:

> "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." 340 U.S., 507.

The Act creates the presumption of coverage. Title 33, U.S.C. 920(a).

The presumption is strengthened by the sparsity of defenses granted the employer by Congress. Title 33, U.S.C. 903(b). Possible administrative misinterpretation of workers' rights is minimized by the further presumption that the worker is not guilty of violating either of the prohibitions. Title 33, U.S.C. 920(c, d); *C. V. Lytle Co.* v. *Whipple,* 156 F.2d 154 (9th Cir. 1944).

These sections are indicative of the Congressional intent.

This Court has propounded and consistently followed the doctrine of liberal interpretation of remedial legislation to accomplish the beneficial intent of Congress. *Cox* v. *Roth,* 348 U.S. 207 (1955); *Pillsbury* v. *United Engineering Co.,* 342 U.S. 197 (1952). The Fifth Circuit has departed from this doctrine.

The Deputy Commissioner made a proper award, and it should be reinstated.

POINT II

The Deputy Commissioner Properly Rejected Outmoded Common-Law Conceptions of Scope of Employment and Held the Decedent Was Injured Within a Zone of Special Danger.

In *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 511, this Court said:

> "Workmen's compensation is not confined by common-law conceptions of scope of employment. * * * All that is required is that the obligations and conditions of employment create the 'zone of special danger' out of which the injury arose".

The Fifth Circuit has removed that protective mantle and has reinstated common-law conceptions of scope of employment—except that at the employer's pleasure, he can decide to furnish some recreation. The doctrine of "zone of special danger" has been discarded by the Fifth Circuit.

This narrowing of the protection of the Act by the Court of Appeals requires review by this Court.

POINT III

The Deputy Commissioner Properly Held That the Decedent Was Covered by the Act for Death Suffered While Returning to Base in a Company Jeep.

Workers are generally held covered by compensation while they are returning to a place of employment away from home.

Where a defense base worker lived one mile from base, but went to town 17 miles away and overstayed his leave, he was awarded compensation for injuries suffered in an accident in a truck he caught to return to base. *Liberty Mutual Ins. Co.* v. *Gray,* 137 F.2d 926 (9th Cir. 1943).

A worker hitched a ride back from a fair 50 miles away and was injured, and awarded compensation. *Hastorf-Nettles, Inc.,* v. *Pillsbury,* 223 F.2d 641 (9th Cir. 1953). See also, *C. V. Lytle Co.* v. *Whipple,* 156 F.2d 154 (9th Cir. 1944).

Frank Gondeck was returning to his base where he was subject to call 24 hours a day. The fact is that he was returning to the base from town. Had he gone in by

bus and hitched back, he would have been covered. The company rules permit employees to hitch back from town. Gondeck was certainly in at least a comparable position to hitch hiker.

POINT IV

The Deputy Commissioner Properly Refused to Penalize the Claimant for Violation of a Non-communicated Unenforced Company Rule.

Nothing in the Act permits an employer to make rules prescribing the limits of coverage, or makes the violation of a company rule grounds to deny coverage. Title 33, U.S.C. 903(b).

O'Leary v. *Brown-Pacific-Maxon Inc.*, 340 U.S. 504 (1951).

Bull Insular Line v. *Schwartz*, 23 F. Supp. 354 (E.D. N.Y. 1938).

Penn Stevedoring Corp. v. *Cardillo*, 72 F. Supp. 991 (S.D. N.Y. 1947).

However, the District Judge specified his reasons for reversal: Gondeck was injured while violating two company regulations regarding the jeep. (Appendix A12).

However else the opinion of the Court of Appeals attempts to avoid this obviously erroneous interpretation of the Act, the holding impliedly adopts it, and Mrs. Gondeck and her daughter are being penalized for the violations of Smith and Fox. Frank Gondeck did not violate the company rule. Justice cries against such a result.

POINT V

The Administrative Procedure Act Does Not Broaden the Scope of Judicial Review.

The Court of Appeals stated its interpretation of the Administrative Procedure Act as to the scope of judicial review of administrative agency orders as follows:

> "This is not an accurate statement, at least since the passage of the Administrative Procedure Act, of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

Presumably, the Court of Appeals would have reinstated the compensation award except that it conceived that under the Act it had authority to reweigh the evidence. This is submitted to be a misconception of the Congressional intent in the passage of the Act.

The Court of Appeals correctly quoted this Court's interpretation of the Act from *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, but misapplied the statement of law by the implication that the Act changed the existing body of law. This Court affirmed a three-judge Court of the Eastern District of Missouri, wherein that Court said:

> "Plaintiffs also refer to section 10 of the Administrative Procedure Act, 5 U.S.C.A., § 1009, but it is clear that that Act merely was a declaration of existing law when judicial review is provided." *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76, 78 (E.D. Mo. 1955), *aff'd*, 350 U.S. 892 (1955).

The Fifth Circuit is in direct conflict with this Court's affirmance of the three-judge Court of the Eastern District of Missouri by holding that the Administrative Procedure Act widened the scope of judicial review.

This Court's interpretations of the scope of judicial review, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), were not adhered to.

POINT VI

The Factual Situation Herein Is Not Singular But Is Recurring.

For some reason or other, defense base workers are frequently involved in serious accidents during recreation and while returning to base.

We know that District Judge Simpson, who sat on the appellate argument below, is awaiting this Court's ruling for guidance on one other case now pending before him for review. The Deputy Commissioner has at least two more cases involving the same legal issues.

Government contractors recruit workers for defense base employment, and cite as inducement the glamorous and exotic life abroad, and the full protection of compensation.

Having induced the workers away from home, the protection of the Act is being withdrawn by the discovery of "judicial small print" when they seek to relieve the tediousness of base life by going to town.

In the ever expanding space age defense program, the Fifth Circuit states will be, as it is now, the principle area for determination of claims under the Defense Bases Act.

With conflicts between Circuits now existing in the interpretations of the Compensation Act, and with one of the judges from the Court below still uncertain of his own ruling, it is submitted that review by this Court of the judgment is required to resolve the issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Certiorari were mailed to Leo Alpert, Biscayne Building, Miami 32, Florida, E. Boardman, U. S. District Attorney and the Attorney General, this ..... day of April, 1962.

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